Supreme Court, U.S.
FILED

98 1877 MAY 17 1999

OFFICE OF THE CLERK

No. 98-___

In The

Supreme Court of the United States

RALPH GIPSON,

Petitioner,

v.

KAJIMA ENGINEERING AND CONSTRUCTION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

PRESTON EASLEY, ESQ.
Counsel of Record
2500 Via Cabrillo Marina
Suite 106
San Pedro, California 90731
Telephone (310) 832-5315

Attorney for Petitioner Ralph Gipson

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31pp

QUESTIONS PRESENTED FOR REVIEW

I. Did the Ninth Circuit err in denying status to a crewman on a dredging barge who was injured when the dredging gear came apart in mid-air and fell on him because said crewman allegedly did not face "perils of the sea?"

II. Did the Ninth Circuit err in denying seaman status to a crew member of a dredging barge and skiff because the crew member was only assigned to the dredging barge and skiff for a "single construction project" [note conflict with *Chandris v. Latsis*, 115 S.Ct. 2172, 2191 (1995)]?

III. Did the Ninth Circuit err in refusing to make a decision on the District Court's denial of vessel status to the dredging barge, a former U.S. Navy barge with a raked bow and hull number?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

DECISION BELOW 1

JURISDICTION 1

STATUTES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

ARGUMENT 4

IMPORTANCE OF THE CASE 4

SEAMAN STATUS CANNOT BE DENIED BECAUSE ONE HAS ONLY WORKED ABOARD A VESSEL FOR A SHORT TIME 10

GIPSON MEETS THE *CHANDRIS* TEST FOR SUBSTANTIAL CONNECTION TO A VESSEL 12

GIPSON WAS EXPOSED TO "PERILS OF THE SEA" 16

BARGE WORKERS SUCH AS GIPSON HAVE HISTORICALLY BEEN FOUND TO BE SEAMEN 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Allen v. Mobile Interstate Piledrivers, 475 So. 2d 530 (SC Ala. 1985) 20

Bennett v. Perini Corp., 510 F.2d 114 (1st Cir. 1975) 20

Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed. 2d 212 (1984) 9

Brown v. ITT Rayonier, Inc., 497 F.2d 234 (CA5 1974) 19

Bullis v. Twentieth Century-Fox Film Corp., 474 F.2d 392 (9th Cir. 1973) 11, 13

Butler v. Whiteman, 356 U.S. 271 (1958) 18

Cabral v. Healy Tibbits Builders, Inc., 128 F.3d 1289 (9th Cir. 1997) ..... *passim*

Chandris v. Latsis, 515 U.S. 370, 115 S.Ct. 2172 (1995) ..... *passim*

Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (3rd Cir. 1998) 8

Gizoni v. Southwest Marine, Inc., 56 F.3d 1138 (9th Cir. 1995) 10, 15, 18, 21

Gizoni v. Southwest Marina, Inc., 909 F.2d 385 (9th Cir. 1980), *aff'd Southwest Marina, Inc. v. Gizoni*, 112 S.Ct. 486 (1991) 21

Guilles v. Sea-Land Service, Inc., 12 F.3d 381 (2nd Cir. 1993) 10

Harbor Tug and Barge Co. v. Papai, 117 S.Ct. 1535, 137 L.Ed. 2d 800 (1997) 5, 18

TABLE OF AUTHORITIES – Continued

Page

Latsis v. Chandris, Inc., 20 F.3d 45 (2d Cir. 1994), *aff'd* 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed. 2d 314 ..... 8, 18

Mach v. The Pennsylvania Co., 317 F.2d 761 (3rd Cir. 1963) 11

Maryland Casualty Co. v. Lawson, 94 F.2d 190 (5th Cir. 1938) 15

McDermott International v. Wilander, 498 U.S. 337 (1991) 22

McDermott International v. Wilander, 112 L.Ed. 2d 866 (1991) 15

Manuel v. P.A.W. Drilling & Well Service, Inc., 135 F.3d 344 (5th Cir. 1998) 6, 7

Norton v. Warner, 321 U.S. 565 (1944) 17, 18, 19

O'Donnell v. Great Lakes Dredge & Dock, Co., 318 U.S. 36 (1943) 16, 17, 18

Palmer v. Fayard Moving and Transportation Corp., 930 F.2d 437 (5th Cir. 1991) 9

Pedersen v. Manitowoc Company, 255 N.E. 146 (CA N.Y. 1969) 20

Porche v. Gulf Mississippi Marine Corp., 390 F.Supp. 624 (ED La. 1975) 10

Reeves v. Mobile Dredging & Pumping Co, Inc., 26 F.3d 1247 (3rd Cir. 1994) 8, 16

Saylor v. Taylor, 77 F.2d 476 (ED Va. 1896) 19

Senko v. LaCross Dredging Corp., 352 U.S 370 (1957) 17, 18

Sharp v. Johnson Brothers Corp., 917 F.2d 885 (5th Cir. 1990) 20

TABLE OF AUTHORITIES – Continued

Page

Slatton v. Martin K. Eby Construction Co., 506 F.2d 505 (8th Cir. 1974) 20

Soucie v. Trautwein Brothers, 275 Cal.App.2d 20, 79 Cal.Rptr. 671 (1969) 19

Southwest Marine, Inc. v. Gizoni, 112 S.Ct. 486 (1991) 6, 17, 21

Summerlin v. Massman Construction Co., 199 F.2d 715 (4th Cir. 1952) 19

Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946) 16

Tonnesen v. Yonkers Contracting, Inc., 82 F.3d 30 (2nd Cir. 1996) 9

Warner v. Goltra, 293 U.S. 155 (1934) 17, 18

Weiss v. Central R.R. Co. of New Jersey, 253 F.2d 309 (2d Cir. 1965) 11

Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326 (9th Cir. 1983) 9, 10

STATUTES

Jones Act, 46 U.S.C. Sec. 688(a) 1

DECISION BELOW

In a decision filed on March 24, 1999, the United States Court of Appeals for the Ninth Circuit affirmed the summary judgment granted to defendant Kajima Engineering and Construction, Inc. by the United States District Court, Central District of California, denying seaman status and vessel status to a crewman on a dredging barge. Plaintiff Gipson's Petition for Rehearing was denied by the Ninth Circuit on April 27, 1999.

JURISDICTION

Petitioner seeks review of decisions of the United States Court of Appeals for the Ninth Circuit filed on March 24, 1999 and April 27, 1999. This Court's jurisdiction is involved pursuant to 28 U.S.C. § 1254(1).

This Petition for Writ of Certiorari is timely filed pursuant to § 2101(c).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. § 688(a), provides, in relevant part,

> "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law. . . . "

STATEMENT OF THE CASE

Plaintiff Ralph Gibson is a 55 year old dredging barge crewman who was seriously injured while working for defendant Kajima at the Henry Ford Bridge project at Terminal Island in Los Angeles Harbor.

Plaintiff started the Kajima job on February 23, 1996 and worked daily until he was injured on March 2, 1996, his tenth day on the job, when a submersible dredging pump was being lifted out of the water by the crane on dredging barge YFN-946 and the dredging hose broke, falling on plaintiff and causing a comminuted fracture of his right knee which is now held together with metal screws. Barge YFN-946 is an ex-U.S. Navy barge with a raked bow, hull number, and all of the classic features of a vessel.

Mr. Gipson spent his first three days on the job installing handrails on the bridge. Then he began laying exhaust hoses across the channel from a skiff, also known as a workboat. This job lasted one day and involved tying sandbags to the exhaust hose for the dredging pump to weigh it down and dumping the weighted hose out of the skiff as it went across the channel.

After the hose laying job was completed (one day) plaintiff was assigned to work on barge YFN-946, a dredging barge, which held a Badger crane that was used to raise and lower a submersible dredging pump. He worked on the barge daily fabricating and welding padeyes for the crane, moving equipment on and off the barge, and assembling pipe for the dredging pump on the barge.

While assigned to barge YFN-946 plaintiff also had to use the skiff to off-load equipment from other barges and transport it to barge YFN-946.

Barge YFN-946 was moved twice at the jobsite before plaintiff's accident and four to five times after his accident. He used the skiff to help move the barge before his accident.

On the day of the accident the crane on the barge was used to lift the dredging pump out of the water and plaintiff was ordered off the barge onto the whaler (part of the cofferdam) to inspect the pump. The dredging hoses broke in mid-air and landed on plaintiff.

Prior to his accident plaintiff also used the skiff to pick up parts for a siphon and bring them to the barge.

Gipson installed handrails his first three days on the job. He spent the fourth day as a crewman in the skiff laying hose, and the next five days were spent on the barge as a part of the barge crew.

Loch Louman, Kajima superintendent, confirmed that for the last five or six days before his accident Mr. Gipson was assigned to the dredging barge and that Mr. Louman saw plaintiff on the barge each of those days assembling equipment for the dredging operation.

Duane Willis, Kajima project superintendent, has testified that plaintiff spent one day laying hose from the skiff, and that plaintiff's primary work station for the week prior to the accident was the dredging barge (YFN-946) where Willis saw plaintiff rigging and fixing dredging hoses on the barge.

Plaintiff's foreman, Marvin Germany, has testified that he operated the skiff and plaintiff worked aboard the skiff stringing dredging hose across the channel, and that Mr. Gipson functioned as a deckhand for the skiff. After the hose-laying operation, Mr. Gipson worked aboard the dredging barge which was the support vessel for the dredging operation (it handled the submersible dredging pump and always had the booster pump on board).

Mr. Gipson was permanently assigned to barge YFN-946 which was a dredging barge and but for the accident Mr. Gibson would have continued working on said barge indefinitely. While Mr. Gipson was assigned to barge YFN-946 it was always in navigable waters in Los Angeles/Long Beach Harbor in what is known as the Cerritos Channel. During the day that plaintiff worked aboard the skiff laying dredging hoses across the Cerritos Channel he spent the first half of the day working aboard the skiff and the second half of the day working aboard barge YFN-946. While assigned to barge YFN-946 each day after the hose laying operation plaintiff spent 90% of each day working aboard the barge. The other 10% of each of those days was spent rigging for the barge and ferrying supplies aboard the skiff.

ARGUMENT

IMPORTANCE OF THE CASE

This case, reported at 972 F.Supp. 537 (CD Cal. 1997), is of critical importance because, in conjunction with its predecessor *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997), it nullifies the Jones Act as a remedy

for marine construction workers. There is also a direct conflict between the circuits. The Ninth Circuit position that one whose work alternates over time between vessel assignments and land assignments is not a seaman while assigned to a vessel is in direct conflict with *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172, 2191 (1995), which held that substantially in terms of assignment to a vessel is "determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure." Contrary to *Cabral* and *Gipson* non-maritime periods of employment never get factored into the equation. In *Cabral* the Ninth Circuit denied seaman status to a crane operator on a floating crane who spent 90% of his work time aboard the floating crane from the time he was assigned to the floating crane until his accident on the gangway to the floating crane five weeks later. Cabral's injury occurred during a Ford Island Ferry project that involved removing and replacing mooring dolphins (pilings). The Ninth Circuit said Cabral was not a seaman because his assignment to the crane barge would end when the Ford Island Ferry project ended. The *Cabral* Court also relied on language in *Harbor Tug and Barge Co. v. Papai*, 117 S.Ct. 1535, 1540, 137 L.Ed. 2d 800 (1997) that said an employee's duties must "take him to sea;" and language in *Chandris v. Latsis*, 515 U.S. 370, 115 S.Ct. at 2190, that said, "The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' "

The *Gipson/Cabral* courts are basically taking the position that if a worker is not *always* assigned to a vessel,

then he cannot be a seaman during the periods when he is assigned to the vessel. *Cabral* and *Gipson* are so closely tied together that it is impossible to analyze one without analyzing the other.

The *Gipson/Cabral* decisions also conflict dramatically with the Supreme Court's decision in *Southwest Marine, Inc. v. Gizoni*, 112 S.Ct. 486, 494 (1991) (shipyard rigger injured on work platform in shipyard) where the Court said, "The Ninth Circuit concluded that questions of fact existed regarding whether the floating platforms were vessels in navigation, and whether Gizoni had sufficient connection to the platforms to qualify for seaman status. Summary judgment was inappropriate. If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of the crew,' it is a question for the jury."

Furthermore, the *Gipson/Cabral* decisions are in conflict with recent Third and Fifth Circuit decisions. In *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998) the Fifth Circuit reversed summary judgment in favor of the employer on the issue of seaman status for an employee on a workover oil rig which was driven onto the deck of a barge and bolted into place. The employee worked on the barge for two months and the barge was equipped with spuds to secure it to the bottom once it reached the worksite. The district court held that the barge was not a vessel and Manuel was not a seaman. The *Manuel* Court held that the work barge was a vessel as a matter of law because (1) the barge was being used for its primary purpose of plugging oil wells; and (2) transporting equipment from location to location on navigable waters was "essential" to the barge's work. *Manuel*,

135 F.3d at 352. The same could be said for barge YFN-946 in *Gipson*.

In a *Cabral/Gipson* type analysis, the *Manuel* court rejected the employee's contention that Manuel did not have the requisite permanent connection to the barge because he "could have been assigned to other work locations." In rejecting this argument and following *Chandris*, the *Manuel* court stated at 135 F.3d 352:

> This argument is seriously flawed. In *Chandris*, the Supreme Court makes it clear that the adequacy of the plaintiff's connection to a vessel is properly assessed on the basis of his work assignment at the time of his injury:
>
> > Such a person should not be denied seaman status if injured shortly after the reassignment [to a vessel], just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea.
>
> *Chandris*, 515 U.S. at 372, 115 S.Ct. at 2191. At the time of his injury, Manuel was assigned to work aboard a vessel in navigation. The fact that Manuel was subject to reassignment by P.A.W. at some later time is of no moment. As the Supreme Court pointed out in *Chandris*, "[w]hen a maritime worker's basic assignment changes, his seaman status may change as well." *Chandris*, 515 U.S. at 372, 115 S.Ct. at 2191. Manuel's basic assignment never changed; he remained assigned to Rig 3 for the entire two months leading up to his injury. Therefore, we conclude that Manuel satisfies *Chandris'* two-prong test for seaman status as a matter of law.

The *Gipson/Cabral* holdings also are in direct conflict with the Third Circuit's decision in *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3rd Cir. 1998). In *Foulk* the Third Circuit reversed summary judgment in favor of an employee where a diver assigned to a crane barge claimed seaman status. A crane barge anchored 150 feet offshore was used to install an artificial reef and serve as a dive station for four commercial divers (including Foulk) who were to assist in the placement of the reef. The District Court held that Foulk's ten day assignment to the barge was temporary and *did not* satisfy the *Chandris* "substantial duration" requirement. In rejecting this finding, and relying on *Chandris*, the *Fourth* Court said that the durational element cannot be answered by an absolute measure or number of days. In explaining its decision the *Foulk* Court said at 144 F.3d 259-260:

> Furthermore, this reasoning is consistent with this court's holding that "lack of long-continued [durational] attachment to a vessel cannot, as a matter of law, serve to deny [Jones Act] seaman status to an employee who is injured while assigned to and performing normal crew service." *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247, 1252 (3d Cir. 1994) citing with approval *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2d Cir. 1994), *aff'd*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed. 2d 314. Although pre-*Chandris*, this court in *Reeves* was cognizant of the "permanence" requirement that required a worker's assignment to be substantial in duration, the holding eventually reached by the Supreme Court in *Chandris*. Our holding in *Reeves* that the lack of long attachment to a vessel cannot deny seaman status as a matter of

law remains effective post-*Chandris*. Here, Foulk was clearly performing the "normal crew service" of the Farrell 256 – installation of the artificial reef. The fact that he was only going to do it for 10 days does not, by itself, mandate summary judgment. Ten days is not a "clearly inadequate temporal connection to vessels in navigation, sufficient to take the question from the jury by granting summary judgment." *See, e.g., Palmer v. Fayard Moving and Transportation Corp.*, 930 F.2d 437 (5th Cir. 1991). A jury could reasonably find that an employee's connections to a vessel are substantial in both duration and nature even if the duration contemplated is 10 days. The analysis of seaman status, and ultimately of whether an employee's connections are substantial in duration and nature, may include a multiplicity of factors. *See e.g., Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed. 2d 212 (1984).

There is yet another circuit conflict in *Tonnesen v. Yonkers Contracting, Inc.*, 82 F.3d 30 (2nd Cir. 1996). Tonnesen was a dockbuilder who was injured on a crane barge during construction of a bridge. The barge was originally built as a car float and was equipped with a crane. The barge was rendered immobile at the worksite by steel spuds. The district court granted summary judgment in favor of the defendant on the basis that the crane was not a vessel in navigation. The Second Circuit *reversed*. The *Tonnesen* court held that there must be a jury determination of the vessel in navigation function where there is some evidence of a transportation function. *Tonnesen, supra*, at 35 [note: there is no requirement for a transportation function in the Ninth Circuit. *Wenzel v.*

Seaward Marine Services, Inc., 709 F.2d 1326, 1328 (9th Cir. 1983); *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138, 1142 (9th Cir. 1995)].

In *Gipson*, the District Court held that barge YFN-946 (ex-U.S. Navy barge with raked bow and hull number which moved crane around jobsite) was not a vessel in navigation for Jones Act purposes. The Ninth Circuit refused to consider the issue of vessel status both in its original ruling and after a petition for reconsideration. Seaman status and vessel status are both factual issues which should have gone to the jury. Clarification of vessel status aside from seaman status is important in the event plaintiff wishes to proceed in a Longshore Act 33 U.S.C. § 905(b) third party action against Kajima in its role as vessel owner as per *Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381 (2nd Cir. 1993).

SEAMAN STATUS CANNOT BE DENIED BECAUSE ONE HAS ONLY WORKED ABOARD A VESSEL FOR A SHORT TIME

In *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1143 (9th Cir. 1996) at page 1143 the Ninth Circuit said that the "connection" requirement of *McDermott*, 498 U.S. at 355, was "not to deprive a person of Jones Act status merely because he serves aboard a vessel for a relatively *short time* (emphasis added)."

In an opinion by the noted jurist Alvin B. Rubin known as *Porche v. Gulf Mississippi Marine Corp.*, 390 F.Supp. 624, 631 (ED La. 1975) the court said:

> "The requirement of a relatively permanent tie to the vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time. *See Weiss v. Central R.R. Co. of New Jersey*, 2d Cir. 1965, 253 F.2d 309."

In *Mach v. The Pennsylvania Co.*, 317 F.2d 761, 764 (3rd Cir. 1963), the court said "lack of long continued attachment to the vessel cannot, as a matter of law, serve to deny seaman's status under the Jones Act to any employee who is injured while assigned to and performing normal crew service."

> "One requirement for seaman status is that there be a more or less permanent connection with the vessel. Significantly the connection may be less permanent, but it cannot be temporary or transitory." *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 394 (9th Cir. 1973).

This is a correct statement of the law.

> Contrary to the Ninth Circuit's interpretation, in *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172, 2191 (1995) the Supreme Court *only* looks at a worker's time spent in *maritime employment* to determine seaman status.

GIPSON MEETS THE *CHANDRIS* TEST FOR SUBSTANTIAL CONNECTION TO A VESSEL

The Jones Act remedy may be available to maritime workers who spend a portion of their time working on shore but spend the rest of their time at sea. *Chandris v. Latsis,* 115 S.Ct. 2172, 2188 (1995).

Chandris at 115 S.Ct. 2190 states that to acquire seaman status one "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."

The *Chandris* court held that connection to a vessel is a concept which involves a "temporal element." *Chandris,* 115 S.Ct. 2191. "Temporal" means relating to a particular time as opposed to eternity.

Chandris defines seaman as an individual who is a member of the vessel's crew as opposed to a land-based employee who happens to be working on the vessel at a given time. *Chandris,* 115 S.Ct. 2191.

According to *Chandris,* 115 S.Ct. 2191-2, one who works 70% of his time in the service of a vessel is a seaman, and when an employee receives a new work assignment (like Gipson) he is entitled to have the substantiality of his vessel-related work made on the basis of his *new* position. After three days on land and one day on the work boat, Gipson was permanently assigned to the dredging barge and was injured on his fifth day on the barge, where he worked 90% of each day, clearly passing the 70% test of *Chandris.* Under *Chandris,* the term "land-based" means those who spend less than 30% of their

time aboard vessels, not those who live on land. This concept of *Chandris* is often misinterpreted. *Chandris* is no different than *Bullis v. Twentieth Century-Fox Film Corp.* 474 F.2d 392, 393 (9th Cir. 1973). The critical holdings of *Chandris*, 115 S.Ct. 2191-2, state:

> "We agree with the Court of Appeals that seaman status is not merely a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land-based and therefore not a member of the vessel's crew, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure. Generally the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases. As we have said, '[t]he inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it.' *Wilander*, 498 U.S. at 356, 111 S.Ct. at 818.
>
> On the other hand, we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a workers' service with a particular employer. Brief for Petitioners 14-15. When a maritime worker's basic assignment changes,

his seaman status may change as well. *See Barrett*, 781 F.2d at 1077 (Rubin, J., dissenting) ("An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the worker's status during any such employment"); *Longmire*, 610 F.2d, at 1347, n. 6. For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position. *See Cheavens*, 64 Tulane L.Rev. at 389-390."

In *Gipson* the Ninth Circuit relied on *Cabral v. Healy Tibbits Builders*, 118 F.3d 1363 (9th Cir. 1997). *Cabral* is a bizarre decision in which seaman status was denied to a crane operator who had worked for five weeks on a crane barge. The Ninth Circuit found that the District Court correctly concluded that there was no evidence from which a reasonable jury could infer that Cabral met the "substantial connection test." The Ninth Circuit said that Cabral was a "land-based worker who had only a transitory or sporadic connection with Barge 538," and that

Cabral was hired as a "crane operator and not as a crewmember." This rationale flies in the face of *McDermott International v. Wilander*, 112 L.Ed. 2d 866, 882 (1991) which said:

> "The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. *See Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (CA5 1938) ('There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise'), cited approvingly in *Norton*, 321 U.S. at 573, 88 L.Ed. 931, 64 S.Ct. 747. In this regard, we believe that requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work."

Clearly a *crane* operator (Cabral) and a *crane* rigger (Gipson) assigned to a *crane* and dredging barge are forwarding the "enterprise" of the barges. Also, since a crane barge crew normally consists of an operator, a rigger, and an oiler, one must wonder what the Ninth Circuit was thinking when it said Cabral was hired "as a crane operator and not as a crew member." What other crew is there?

Clearly *Cabral* and *Gipson* represent situations where the courts have ignored the holdings of *Gizoni*, *Wilander*,

and *Chandris* and invaded the province of the jury by deciding highly disputed factual issues.

GIPSON WAS EXPOSED TO "PERILS OF THE SEA"

In determining seaman status courts have gotten caught up on the phrase "perils of the sea" which sounds more like something out of a romance novel than an element of seaman status. Workers' laboring on the decks of harbor craft may face even greater "perils of the sea" than a crewman on a modern, fully automated containership watching a movie in the crew's lounge as the vessel sails from Los Angeles to Honolulu.

Gipson faced the perils of the sea. *Chandris*, 115 S.Ct. 2183, said that seamen are wards of admiralty because they are liable "to sudden sickness for change of climate, exposure to peril, and exhausting labour." Gipson was exposed to all of these perils working long hours on the crane barge without lifelines where slips and falls on a frequently wet and worn metal deck and falling overboard were a constant risk.

In elaborating on the seaman status test, this Court has made clear that an injured worker must be a "member of the crew of a vessel plying in navigable waters." *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946); *see also O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42-43 (1943) (noting the requirement of a "vessel plying in navigable waters"). Lower courts have continued to recognize and apply this requirement. *See, e.g., Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247 (3rd Cir. 1994). It is the only requirement relating to location.

Petitioner easily satisfies it, because Barge 538 was operating in the navigable waters of Pearl Harbor.

The Ninth Circuit's imposition of a far more restrictive location test was not only unwarranted, it was flatly inconsistent with a number of the Court's decisions. The *O'Donnell* Court paid the greatest attention to issues of location. In that case, a deckhand was injured on land while in the service of a vessel transporting sand on Lake Michigan. The Seventh Circuit had held that no recovery was available when the injury did not occur on navigable waters. Reversing, this Court held that the deckhand could recover under the Jones Act as a matter of law, notwithstanding that he was injured on land, because he was a member of the crew of a vessel that operated on navigable waters (albeit not the open sea). 318 U.S. at 42-43.

In at least five other cases, this Court has recognized that seamen who never worked on the high seas were entitled to Jones Act coverage. Most recently, this Court upheld the potential availability of a Jones Act remedy for an injured employee who did all of his work on a barge in San Diego Harbor or on land. *See Southwest Marine Inc. v. Gizoni*, 502 U.S. 81 (1991). This result follows a long line of cases. In *Warner v. Goltra*, 293 U.S. 155 (1934), the Court held that the master of a river tugboat who had been killed on the Ohio River was a Jones Act seaman. In *Norton v. Warner Co.*, 321 U.S. 565 (1944), a boatman on a barge that "never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia," *id.* at 567, was found to be a seaman entitled to recover under the Jones Act. In *Senko v. LaCrosse Dredging Corp*, 352 U.S. 370 (1957), this Court

affirmed a jury finding that a Jones Act plaintiff was a member of the crew of a dredge that was anchored to the Illinois shore of the Mississippi River "during all the time petitioner worked for [the vessel owner]" *Id.* at 372; *see also id.* at 376 (Harlan, J., dissenting) (the plaintiff "never even saw [the dredge] being moved"). And in *Butler v. Whiteman*, 356 U.S. 271 (1958) (per curiam), the Court held that a jury could decide the seaman status of a crewman on a Mississippi River tug.

The use of phrases such as "perils of the sea," going "to sea," and "sea-based employees" in *Papai* and *Latsis* could not have been intended to overrule *O'Donnell, Gizoni, Warner v. Goltra, Norton v. Warner Co., Senko,* and *Butler*. In this context, "sea" is simply a convenient shorthand for "navigable waters." Indeed, this Court has regularly used "sea" when all navigable waters must have been intended. *See, e.g., Latsis, supra,* 515 U.S. at 364 (characterizing the *Gizoni* worker's time in San Diego Harbor as "time at sea"); *id.* at 373 (contrasting "out of navigation" with "at sea" in the context of holding that a six-month period in drydock may be time "in navigation"). This usage goes back to the early Jones Act cases. In *Warner v. Goltra, supra,* for example, the Court mentioned a definition of "a seaman" as "one who lives his life upon the sea" in the context of the master of a river tugboat. 293 U.S. at 157. (This language was quoted in *Latsis, supra,* 515 U.S. at 355.) In contrast, when the *Papai* or *Latsis* Court meant to limit the meaning of the term "sea" in the manner suggested by the Ninth Circuit, it used a phrase such as "the high seas," *Papai, supra,* 117 S.Ct. at 1543, or "the open sea," *Latsis, supra,* 515 U.S. at 351. *Cf. Id.* at 356 (noting that a "blue-water seaman" is at

one end of a broad spectrum, and recognizing that others on that spectrum are still entitled to "seaman" status) (quoting *Brown v. ITT Rayonier, Inc.*, 497 F.2d 234, 236 (CA5 1974).

In summary, petitioner is not seeking a novel expansion of Jones Act coverage. He is simply seeking the restoration of the traditional understanding of seaman status that this Court has recognized in opinions stretching over almost sixty years. At the very least, petitioner's status is a fact question that should have been decided at trial rather than on summary judgment.

BARGE WORKERS SUCH AS GIPSON HAVE HISTORICALLY BEEN FOUND TO BE SEAMEN

See Saylor v. Taylor, 77 F.2d 476 (ED Va. 1896) (held that dredge without motive power was a vessel and persons employed on it were seamen just as those "who breast the angry waves of the Atlantic"); *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4th Cir. 1952) (held that as a matter of law person employed on crane which had no motive power of its own anchored in river engaged in pouring concrete forms for bridge was a seaman and barge was a vessel in navigation, reversing lower court judgment); *Norton v. Warner*, 321 U.S. 560 (1944) (held that barge without motive power which never went to sea and was confined in its operation within a radius of 30 miles of Philadelphia was a vessel for Jones Act purposes); *Soucie v. Trautwein Brothers*, 275 Cal.App.2d 20, 79 Cal.Rptr. 671 (1969) (held that pile

driving barge with no motive power used to build seawall in Newport Harbor was a special purpose vessel for Jones Act purposes and reversed verdict for employer on seaman status issue); *Pedersen v. Manitowoc Company*, 255 N.E. 146 (CA N.Y. 1969) (whether employees whose duties included maintenance and operation of barge anchored in Hudson River and used in bridge construction were seamen and whether vessel was in navigation were factual issues precluding summary judgment); *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505 (8th Cir. 1974) (affirmed Jones Act judgment in favor of plaintiff injured on floating work barge moored to bank of Arkansas River which was being used to construct a dolphin – note: identical fact pattern to *Cabral v. Healy Tibbitts Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997); *Slatton* court held that vessel status and seaman status were questions for the jury); *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975) (reversed directed verdict against carpenter employed on steel barge without motive power and with a crane on deck used in bridge construction; held that vessel status and seaman status were actual issues for the jury); *Allen v. Mobile Interstate Piledrivers*, 475 So.2d 530 (SC Ala. 1985) (reversed judgment NOV in favor of employer against concrete finisher doing bridge construction work from barge with crane on deck which was held in place with metal poles known as spuds on Mobile River after plaintiff was injured when he fell off ladder going to barge and landed on cofferdam); *Sharp v. Johnson Brothers Corp.*, 917 F.2d 885 (5th Cir. 1990) (reversed summary judgment holding that two spud barges used as pile

driving barges and two ordinary flat deck barges were not vessels).

CONCLUSION

The *Gipson/Cabral* decisions represent a sharp break from the Ninth Circuit's past holdings in *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990), *aff'd Southwest Marine, Inc. v. Gizoni*, 112 S.Ct. 486 (1991), and *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138 (9th Cir. 1995), all of which held that seaman status and vessel status for a shipyard rigger injured on a pontoon barge in the shipyard were jury issues.

The *Gipson/Cabral* decisions have now unraveled the *Gizoni* trilogy of cases and destroyed seaman status for marine construction workers on crane barges, piledriving barges, and dredging barges. Just when it appeared that some measure of consistency was entering the seaman status issue the Ninth Circuit has chose to upset the applecart. How long someone has been or will be assigned to a vessel and whether they will ever be assigned to a vessel again are not logically related to whether someone is a seaman. If someone is a tugboat captain part of the year and a doughnut maker part of the year, does this mean he is not a seaman when he is operating the tugboat?

Is it in the interest of the courts to remove harbor tugs, barges, ferries, and water taxis from the Jones Act because these vessels do not sail the open seas?

Is the peril of falling overboard a peril that only exists outside of a harbor?

Many vessels such as dredges, floating cranes, driving barges, pile driving barges, and oil drilling barges do their work while stationary. In light of the mission/function test established in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991) it makes no sense to deprive workers on these vessels of seaman status. There is no legal requirement that one must be "rowing the boat" to achieve seaman status.

In *Wilander* the Supreme Court said seaman status was a jury issue if reasonable persons, applying the proper legal standard, could differ as to whether an employee was a member of the crew. Certainly Gipson is a case where reasonable people could differ.

The *Gipson/Cabral* decisions (*Gipson* was published at the District Court level as *Gipson v. Kajima Engineering and Construction Co.*, now invites a summary judgment motion in every marine construction cases. Is it the intention of the courts to kick everyone out of the Jones Act who is not on a moving vessel outside of a harbor?

The *Gipson/Cabral* courts have misinterpreted and overextended the findings of *Chandris*. It is time for the Supreme Court to step in and restore order.

Respectfully submitted,

PRESTON EASLEY, Esq.
Counsel of Record
2500 Via Cabrillo Marina
Suite 106
San Pedro, California 90731
Telephone (310) 832-5315

Attorney for Petitioner
Ralph Gipson

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH GIPSON, Plaintiff-Appellant, v. KAJIMA ENGINEERING AND CONSTRUCTION, INC. Defendant-Appellee.	No. 97-56148 D.C. No. CV-96-07761-ABC MEMORANDUM* (Filed Mar. 4, 1999)

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Submitted March 1, 1999**
Pasadena, California

Before: BROWNING, WIGGINS, and GRABER, Circuit Judges

The touchstone of seaman status is whether a worker "face[d] regular exposure to the perils of the sea." *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 560 (1997). Like the crane operator in *Cabral v. Healty Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997), Gipson spent most of his working hours aboard a floating platform, but offered no evidence he was on the barge while it was towed or

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir. R. 36-3.

**The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2).

otherwise endured the hazards of the sea. *See id.* at 1293. His duties involved less exposure to the "perils of the sea" than those of the land-based worker in *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996), who was injured while securing the mooring lines as the vessel was moved – a task traditionally performed by seamen. *See id.* at 905.

Gipson's connection to the barge and the skiff was also "transitory or sporadic." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Like the land-based workers in *Heise* and *Cabral*, Gipson's association with the barge and the skiff was limited to a single bridge construction project; he presented no evidence he had worked on the barge or skiff before that project, or would continue to work on either vessel after the project was completed.

We reject Gipson's argument that he satisfied the 30% "rule of thumb" established in *Chandris*, 515 U.S. at 371 ("A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."), because he spent 90% of his work time on the barge and the remaining 10% on the skiff. The crane operator in *Cabral*, who spent 90% of his work time aboard a barge during his six-week employment, did not satisfy the "substantial connection" test. *See Cabral*, 128 F.3d at 1293. A land-based worker who spends 100% of his or her time on board a vessel is not for that reason a seaman. *See, e.g., Papai*, 520 U.S. at 559 (deckhand hired for one-day painting job, who presumably spent *all* his time aboard the vessel, failed the substantial connection test where his employment "did not include any seagoing activity" and "he was not going to sail with the vessel after he finished painting it.").

We conclude Gipson was not a seaman for purposes of the Jones Act.[1]

AFFIRMED.

---

[1] We need not and do not reach the issue of whether the barge was a "vessel in navigation," and express no opinion on the issue.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH GIPSON, Plaintiff-Appellant, v. KAJIMA ENGINEERING AND CONSTRUCTION, INC. Defendant-Appellee.	No. 97-56148 D.C. No. CV-96-07761-ABC ORDER (Filed Apr. 27, 1999)

Before: BROWNING, WIGGINS, and GRABER, Circuit Judges

The petition for rehearing is denied.

Supreme Court, U.S.
FILED
98 1877 MAY 17 1999
OFFICE OF THE CLERK

No. 98-___

In The

Supreme Court of the United States

RALPH GIPSON,

Petitioner,

v.

KAJIMA ENGINEERING AND CONSTRUCTION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

PRESTON EASLEY, Esq.
Counsel of Record
2500 Via Cabrillo Marina
Suite 106
San Pedro, California 90731
Telephone (310) 832-5315

Attorney for Petitioner
Ralph Gipson

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23pp

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Ralph Gipson, Plaintiff, vs. Kajima Engineering and Construction, Inc., Defendant.	CASE NO.: CV 96-7761 ABC (Mcx) ORDER RE: Kajima's Motion for Summary Judgment (Filed July 7, 1997)

Defendant KAJIMA ENGINEERING AND CONSTRUCTION, INC.'s Motion for Summary Judgment came on regularly for hearing before this Court on July 7, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that Defendant's Motion is GRANTED.

I. Procedural Background

On November 5, 1996 Plaintiff RALPH GIPSON ("Gipson") filed a Complaint for damages against Defendant KAJIMA ENGINEERING AND CONSTRUCTION, INC., alleging that the Court has federal question jurisdiction over this action pursuant to the Jones Act, 46 U.S.C. § 688. On November 18, 1996, Gipson filed a First Amended Complaint ("FAC"). On November 22, 1996, Kajima filed an Answer to Plaintiff's FAC. On February 3, 1997, Gipson filed a Motion for leave to File a Second Amended Complaint. Kajima filed a Non-Opposition to the Motion and the Second Amended Complaint ("SAC") was deemed filed on February 18, 1997.

Gipson's SAC incorporated three causes of action for: (1) negligence; (2) unseaworthiness; and (3) maintenance and cure. In relevant part, the SAC contains the following allegations:

1. During all times mentioned herein, Kajima was the owner and operator of a certain barge known as YFN-946 and a skiff (workboat). [*See* SAC ¶ 4].

2. At all times mentioned herein, Gipson, an employee of Kajima, was assigned to the crew of said barge as a piledriver/rigger and was an operator and crewman for said skiff. [*See* SAC ¶ 5].

3. On or about March 2, 1996, while said barge was in navigable waters in Los Angeles Harbor adjacent to the Henry Ford Bridge, Gipson suffered severe and disabling injuries aboard said barge when a coupling on a dredging pump exhaust hose being supported by a crane on said barge parted and caused the exhaust hose to fall on Gipson, severely injuring him. [*See* SAC ¶ 6].

4. Gipson is entitled to damages as a result of Kajima's negligence, failure to provide a seaworthy vessel, and failure to pay maintenance and cure. [*See* SAC ¶¶ 6-15].

On May 9, 1997, Kajima filed the instant Motion for Summary Judgment. In brief, Kajima's Motion is brought on the grounds that Gipson was not a seaman at the time of his injury and, therefore, has no cognizable claim under the Jones Act or under the general maritime law.[1]

---

[1] Kajima asserts that Gipson's claims are properly addressed by the Longshore Workers and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*

On May 19, 1997, Gipson filed his Opposition to Kajima's Motion. On May 27, 1997, Kajima filed its Reply.

II. Factual Background[2]

Defendant Kajima is a construction contractor hired to reconstruct the Badger Avenue Railroad Bridge, which crosses the Cerritos Channel of Los Angeles' inner harbor at Henry Ford Avenue. The reconstruction involves reinforcement of the two bridge footings, replacement of the center span, and replacement of the lift mechanism. In order to reinforce the submerged bridge footings, the footings are first enclosed by a cofferdam formed by a ring of corrugated sheets of steel driven into the river bottom. Seawater is then pumped out of the cofferdam to create a dry work area. As the water level inside the cofferdam is lowered, steel I-beams are installed in rings around the inside perimeter of the cofferdams to resist

---

[2] The Court's findings of fact, as stated in the "Factual Background" section in this Order, are derived wholly from Defendant's Statement of Uncontroverted Facts, which is adequately supported by admissible evidence. In his Statement of Genuine Issues of Material Fact. Plaintiff has completely failed to controvert any facts set forth in Defendant's Statement. Instead, Plaintiff has merely stated questions of fact and law, which are unsupported by any citations of evidence creating a genuine issue of fact on any of these questions. Pursuant to the Local Rules, "the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Issues' *and* (b) controverted by declaration or other written evidence filed in opposition to the motion." Local Rule 7.14.3 (emphasis added).

the pressure of water outside the cofferdam. Once in place, the steel I-beams are referred to as the "whale frame."

Plaintiff Gipson was dispatched by his union, Local 2375 of the Wilmington Pile Driver's Union, to serve as a rigger and pile driver for Kajima in the reconstruction of the bridge. He was not assigned to any barge or skiff.[3] Gipson's duties were those of a general pile driver and required him to perform a variety of tasks on land, on the bridge, on the cofferdam whale frames, on floating work platforms, and in the skiff, as the exigencies of a given project demanded. However, while Gipson worked on a barge at times, he did not work *for* a barge. Much of the work he did on barge YFN-946 could have been performed either on the barge or on land. Further, the skiff was not assigned to one person and, while the bridge, cofferdams, and barges were all accessible by land, Gipson and all of the other pile driver/riggers operated and rode in the skiff as a convenient method of moving about the work site.

At all times relevant herein, Gipson lived in Long Beach, drove to the bridge work site each morning, and parked his car on the North side of the bridge by the Kajima offices. Gipson has never carried seaman's papers, never worked on a ship at sea, and never held a Coast Guard license. On the other hand, he possesses a crane operator's license, a Class One driver's license (to operate semi-trucks needed to move cranes from place to

---

[3] The skiff at issue in this case was a small steel work boat propelled by an outboard motor.

place), a forklift operator's license, and he is a certified welder.

Gipson's Pre-Injury Duties at Kajima

Gipson worked for Kajima for just *eight days* before he was injured. On February 22, 1996, Gipson reported to Kajima's project superintendent and was put to work building wooden safety handrails on the bridge, which he did for two or three days. During that time, he was also required to exchange empty oxygen bottles for full bottles on the bridge and on the 4500 crane barge.

After building the handrails, Gipson was instructed to help lay an exhaust hose across the 200 foot channel. This task required him to load sand bags onto a wooden float,[4] tie the bags to the exhaust hose, lower the hose into the channel from the wooden float, and connect the exhaust hose to the pump hose from the whale frame. The task also required the use of the skiff[5] to help maneuver the wooden float. It took most of one day to lay the exhaust hose.

---

[4] The wooden float was a small raft constructed of wooden planks, between eight and twenty-five feet long and six and twelve feet wide. It was used as a floating work platform.

[5] Foreman Marvin Germany operated the skiff on the day the Gipson assisted in laying exhaust hose across the channel. Gipson and other workers worked from the small wooden float. [Gipson Depo. at 22:12 – 23:19]. Gipson also worked from the skiff at times during the hose laying operation. While in the skiff on that day, Gipson held lines tethered to the small wooden float. [Germany Depo. at 8:14 – 9:20].

On his fourth day at Kajima, Gipson was required to remove debris from deck barge YFN-946. He then built a wooden ramp from shore to the barge so that a hydraulic crane could drive onto the barge, and he helped place the crane on the barge.

Deck barge YFN-946 was thirty feet wide and one hundred feet long. It had no navigational equipment, no lights, no means of self-propulsion, no crew quarters or shelter, no bilge pumps, and no deck winches. It was neither registered with nor inspected by the U.S. Coast Guard. The hydraulic crane was placed aboard barge YFN-946 for the purpose of handling and maneuvering the pump hoses used in evacuating the cofferdams.

On his fifth day, Gipson's work included the following tasks: (1) He used barge YFN-946 as a situs for fabricating pad eyes from an H-beam, which took about four hours, and welding the pad eyes onto the deck of the barge to secure the crane; (2) He rigged equipment, which was lifted by the hydraulic crane, from barge YFN-946, from the bridge trestle, from the whale frame, and from other barges; and (3) He cleaned debris from the deck of barge YFN-946.

On his sixth and seventh days at Kajima, Gipson constructed and connected the pump pipes and hoses to be used in evacuating the cofferdams, using the barge as his work platform. He connected twelve-foot pipe sections with rubber gaskets, clamps and turnbuckles, then attached the exhaust hose to the pipeline. Gipson also built a siphon, again using the barge as his work platform.

On his eighth day, at the beginning of the shift, Gipson was injured while standing on the whale frame of the south cofferdam. He had just arrived at work and was assisting in the movement of the pump within the cofferdam when a hose coupling broke and a hose fell onto and injured his right leg.

At all relevant times herein, deck barge YFN-946 was used as a work platform to support and facilitate the evacuation of the cofferdams by allowing pump and crane access to the interiors of the cofferdams, and was used as a situs for construction from which Gipson fabricated steel pad eyes, built pump pipes and hoses, constructed a siphon, welded, and rigged equipment.

Kajima contends that deck barge YFN-946 was not engaged in navigation, during the course of Gipson's employment. It never left the job site, but moved only around and between the two bridge footings as necessary to allow access to the cofferdams. The barge was generally in tight quarters next to the cofferdams and was always tied off to something, even when its position was being adjusted about the bridge footings and cofferdams.

Gipson's Post-Injury Duties at Kajima

Gipson returned to work two days after his injury, after undergoing surgery, and was reassigned to manage the pump outtake hose. He was then made foreman in charge of the safety handrail projects on the bridge. Gipson also unloaded equipment and materials delivered to the worksite from trucks and carried material to the bridge trestle using a forklift. He also fabricated brackets in the yard.

Gipson continued to work at the bridge reconstruction site for almost five months after his injury. His last day working for Kajima was July 26, 1996.

III. Discussion

A. Summary Judgment Standard

It is the burden of the party who moves for summary judgment to establish that there is "no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)). This means that, if the moving party has the burden of proof at trial, that party must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in that party's favor. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Furthermore, the court must view the evidence presented to establish these elements "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

If the opponent has the burden of proof at trial, then the moving party has no burden to negate the opponent's

claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In other words, the moving party does not have the burden to produce *any* evidence showing the absence of a genuine issue of material fact. *Id.* at 325. "Instead, . . . the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings . . . [T]he adverse party's response . . . *must set forth specific facts* showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." *Anderson*, 477 U.S. at 252. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 248; *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9th Cir. 1955).

B. Analysis

The essential issue presented by Defendant Kajima's motion is whether Plaintiff Gipson was a "seaman" as

that term is defined under the Jones Act.[6] The question of seaman status under the Jones Act is normally for the trier of fact to decide. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, ___, 115 S.Ct. 2172, 2187 (1995). However, the question of who is a "seaman" is a mixed question of law and fact, and in cases where the facts and law will only support one conclusion, the Court may remove the issue

---

[6] The Jones Act provides a cause of action in negligence for "any seaman" injured "in the course of his employment." 46 U.S.C. § 688(a). Under general maritime law prevailing prior to the statute's enactment, seamen were entitled to "maintenance and cure" from their employer for injuries incurred "in the service of the ship" and to recover damages from the vessel's owner for "injuries received by seamen in consequence of the unseaworthiness of the ship," but they were "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." *The Osceola*, 189 U.S. 158, 175 (1903). "Congress enacted the Jones Act in 1920 to remove the bar to suit for negligence articulated in *The Osceola*, thereby completing the trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the 'perils of the sea.' " *Chandris, Inc. v. Latsis*, 515 U.S. 347, ___, 115 S.Ct. 2172, 2183 (1995) (citations omitted). "Justice Story identified this animating purpose behind the legal regime governing maritime injuries when he observed that seamen 'are emphatically the wards of the admiralty' because they 'are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour." *Id.* "Traditional seamen's remedies . . . have been 'universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to the sea in ships are subjected.' " *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 354 (1991), *quoting, Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J. dissenting).

from the jury's consideration and enter summary judgment. *Id.* at 2190, 2192. In fact, summary judgment on seaman status is "mandated where the facts and the law will reasonably support only one conclusion." *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 356 (1991).

In *Chandris,* the Supreme Court articulated a two-prong general standard for determining seaman status. In order for an employee to be considered a "seaman" under the *Chandris* standard, the employee must: (1) have duties that "contribute to the function of the vessel or to the accomplishment of its mission;" and (2) "have a connection to a vessel in navigation (or identifiable group of such vessels) that is substantial in terms of both its duration and nature." *Chandris,* 115 S.Ct. at 2190.

In the instant motion, Kajima asserts that Gipson fails to meet the second requirement articulated in *Chandris.* Kajima argues that Gipson's involvement with the two "vessels" alleged in this action (barge YFN-946 and the skiff) does not confer seaman status upon him. Specifically, Kajima argues that: (1) barge YFN-946 was merely a floating work platform and was never a vessel that was "in navigation;" and (2) Gipson's connection to the skiff was not "substantial in terms of both its duration and nature."[7] For reasons articulated below, the Court agrees.

---

[7] Kajima's arguments do *not* raise the following issues: (1) whether the barge or the skiff are "vessels;" (2) whether Gipson's connection to the barge was "substantial in terms of its duration and nature;" or (3) whether the skiff was "in navigation." These issues are not before the Court.

1. Whether Barge YFN-946 Was "In Navigation"

Kajima argues that it is entitled to summary adjudication of the issue of whether barge YFN-946 was "in navigation" during the time in which Gipson had a connection to the vessel. Removing the issue of whether a vessel was "in navigation" from the jury's consideration is appropriate in cases where the facts and the law will reasonably support only one conclusion on the issue. *See Chandris*, 115 S.Ct. at 2192. In this case, the only reasonable conclusion is that barge YFN-946 was not "in navigation" during the time relevant to Gipson's connection to the barge.[8]

The facts in this case are quite similar to those in *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1991) (en banc), *cert. denied*, 506 U.S. 827 (1992), and persuade the Court to reach a similar result.[9] In *DiGiovanni*, a member of the carpenter's union sued under

---

[8] According to Professor Schoenbaum, "[t]he 'in navigation' requirement is especially important and should be strictly construed in the case of land-based workers assigned to a barge or other floating structure. Such a worker may qualify as a seaman only if the craft is in actual navigation at the time of the accident." Thomas J. Shoenbaum, *Admiralty and Maritime Law*, 2d Ed., § 6-9, p. 273 (West 1994).

[9] In *DiGiovanni*, the First Circuit reversed a district court finding, which was based on a jury's answers, that the plaintiff was entitled to seaman status. Sitting en banc, the First Circuit held that if a barge or other float's purpose or primary business is not navigation or commerce, then a worker assigned thereto for a shore enterprise is to be considered a "seaman" only when the barge or float is in actual navigation or transit. *See DiGiovanni*, 959 F.2d at 1123.

the Jones Act for work he performed on a vessel. The "vessel" at issue was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment such as navigation and anchor lights. *See* 959 F.2d at 1119. Although the *DiGiovanni* barge had no true means of self-propulsion, it met the commonly understood characteristics of a vessel and, indeed, was inspected by the Coast Guard. *See Id.* at 1120-21. The *DiGiovanni* barge's use during the time relevant to the action was to float at the Jamestown, Rhode Island, Bridge, bearing a crane that was being used for bridge construction. *See Id.* at 1121. The barge's permanent station was at Davisville, Rhode Island, from which it was towed by a tug, from time to time, to perform various shore jobs. *See Id.* It had been at the Jamestown Bridge for a month. It was positioned about the bridge, and moved away from the pilings at night to prevent damage. *See Id.*

Upon the facts listed above, the First Circuit ruled that the *DiGiovanni* barge was not "in navigation" for purposes of invoking the Jones Act. The barge "was simply moved about the piers for working convenience, and at night for safety." *Id.* at 1124. The First Circuit ruled that this movement "was hardly navigation or commerce, and did not diminish the primary nature of the platform's shore use and purpose." *Id.*

In the instant case, the uncontroverted facts show that the use of barge YFN-946 was nearly identical to the use of the *DiGiovanni* barge. Specifically, barge YFN-946 was thirty feet wide and one hundred feet long. It had no navigational equipment, no lights, no means of self-propulsion, no crew quarters or shelter, no bilge pumps, and no deck winches. It was neither registered with nor

inspected by the U.S. Coast Guard. The hydraulic crane was placed aboard barge YFN-946 for the purpose of handling and maneuvering the pump hoses used in evacuating the cofferdams.

At all relevant times herein, barge YFN-946 was used as a work platform to support and facilitate the evacuation of the cofferdams by allowing pump and crane access to the interiors of the cofferdams, and was used as a situs for construction from which Gipson fabricated steel pad eyes, built pump pipes and hoses, constructed a siphon, welded, and rigged equipment.

During the course of Gipson's employment, it is clear that barge YFN-946 was not engaged in navigation. It never left the job site, but moved only around and between the two bridge footings as necessary to allow access to the cofferdams. The barge was generally in tight quarters next to the cofferdams and was always tied off to something, even when its position was being adjusted about the bridge footings and cofferdams.

Similar to the movement of the *DiGiovanni* barge about the Jamestown Bridge pilings, the movement of barge YFN-946 around and between the cofferdams surrounding the two bridge footings of the Badger Avenue Railroad Bridge did not constitute navigation. Barge YFN-946 was merely used as a work platform during Gipson's connection to it, and, therefore, was not a vessel "in navigation" under the second prong of the *Chandris* standard.

Gipson argues, however, that the *DiGiovanni* decision was legally incorrect and is not followed in the Ninth

Circuit.[10] Gipson argues that this case is controlled by the *Gizoni* trilogy, *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990) ("*Gizoni I*"); *Southwest Marine, Inc. v. Gizoni*, 502 U.S 81 (1991) ("*Gizoni II*"); and *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138 (9th Cir. 1995) ("*Gizoni III*"). The Court finds, however, that the *Gizoni* case is factually distinguishable and, therefore, the several *Gizoni* decisions do not require the Court to find that barge YFN-946 was "in navigation" during Gipson's connection to it.

The *Gizoni* case was brought by a rigging foreman, Mr. Gizoni, who worked and *rode* upon several floating platforms, and was injured while working aboard one of those platforms. Gizoni's employer, Southwest Marine, Inc., owned several floating platforms used in connection with ship repair activities. *See Gizoni I*, 909 F.2d at 387. These platforms had no power, means of steering, navigation lights, or navigation aids. However, they were moved from place to place by tugboats, which positioned the platforms alongside vessels that were being repaired at berths, or in dry dock at Southwest Marine's shipyard, or at the nearby Naval Station. *See Id.* During their voyages to various ship repair locales, these platforms usually transported materials and equipment to be used on the specific ship repair jobs. *See Id.*

---

[10] Contrary to Gipson's unsupported assertion that the *DiGiovanni* decision was legally incorrect and not followed by the Ninth Circuit, the Court notes that *DiGiovanni* was favorably cited by the Ninth Circuit in *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 661 (9th Cir. 1992) and by the Supreme Court in *Chandris*, 115 S.Ct. at 2192.

Gizoni's specific job duties not only required him to work upon the platforms once they were in position next to the ships, but also required him to "*rid[e]* the platforms as they were used to move equipment, materials, supplies, and vessel components around the shipyard and on to and off of vessels being repaired." *Id.* (emphasis added). When the platforms were being transported by the tugboats, "Gizoni occasionally served as a lookout and gave maneuvering signals to the tugboat operator." *Id.* "He also received lines passed to the platforms by the ships' crews to secure the platforms." *Id.*

In the instant case, there is no evidence that Gipson performed any similar duties with respect to barge YFN-946. There is no evidence that Gipson *rode* aboard barge YFN-946 as it was being transported to the bridge reconstruction site from its prior location. In fact, there is no evidence at all that Gipson ever *rode* on barge YFN-946 when it was unmoored. To the contrary, the uncontroverted facts show that "[t]he barge was generally in tight quarters next to the cofferdams and was *always* tied off to something, even when its position was being adjusted about the bridge footings and cofferdams." *See* Factual Background, *supra* (emphasis added).

As the Ninth Circuit stated in "*Gizoni III*", in order to prove that he is a seaman, a plaintiff "must show by a preponderance of the evidence: (1) that the vessel on which he was employed was *in navigation*, (2) that he had a 'more or less permanent connection with the vessel,' and (3) that his job contributed to the function or mission of the vessel." 56 F.3d at 1141 (emphasis added) (citations omitted). The Ninth Circuit has also noted, in a case decided after both "*Gizoni I*" and "*Gizoni II*", that "[a]

vessel is *in navigation* when 'engaged as an instrument of commerce *and transportation* on navigable waters.' " *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 569 (9th Cir. 1992) (emphasis added) (citation omitted). In this case, the uncontroverted facts show that barge YFN-946 was not engaged in "transportation" of any sort during the time in which Gipson had a connection to it.[11] Accordingly, under the law of the Ninth Circuit, barge YFN-946 was not "in navigation" during Gipson's connection to the vessel.

Even if this Court were to find that barge YFN-946 was "in navigation," the Court would still find that Gipson was not a seaman by virtue of his connection with the barge. At bottom, Gipson was a "land-based" worker who is not entitled to seaman status because he never encountered a seaman's perils, which are the basis of the generous relief afforded by the Jones Act and general maritime law. "The requirement that a seaman 'work at sea in the service of a ship' embodies the first basic principle of the definition of 'seaman' that *Chandris* identified: " '[S]eamen do not include land-based workers.' " *Heise v. Fishing Company of Alaska, Inc.*, 79 F.3d 903, 906 (9th Cir. 1996), *quoting, Chandris*, 115 S.Ct. at 2185. Moreover, the Ninth Circuit and the Supreme Court have expressly noted that "land-based maritime workers injured while on a vessel in navigation remain covered by the LHWCA . . . [and] do not become seamen because

---

[11] These facts are readily distinguishable from those in the *Gizoni* trilogy, where the floating platforms at issue were clearly involved in transportation during the plaintiff's involvement with them.

they happen to be working on board a vessel when they are injured." *Id.*

In *Heise*, the Ninth Circuit denied seaman status to a plaintiff whose case was based on stronger facts than those in the instant case. The vessel in *Heise* was a seagoing fishing vessel – clearly a "vessel in navigation." The plaintiff, Mr. Heise, was a temporary laborer assigned to assist in repairs and annual maintenance while the ship was in dock. Like Gipson, Heise never previously worked on a seagoing vessel. *See Heise*, 79 F.3d at 905. Unlike Gipson, Heise slept on the vessel during his period of employment. *See Id.* Unlike Gipson's barge YFN-946, Heise's fishing vessel was moved by a tugboat twice during Heise's employment. *See Id.* When Heise's vessel was moved for a second time, Heise and another temporary worker were *on board* the vessel to receive and secure its mooring lines. *See Id.* Unlike Gipson, Heise's injury was sustained *on board* the vessel.

Despite the facts noted above, the Ninth Circuit denied seaman status to Heise. Because the facts in the instant case are weaker than those in Heise, seaman status must also be denied to Gipson. In *Heise*, the panel held that "Heise was a land-based worker" because he was only hired "as a temporary laborer and only for the duration of the repairs and maintenance [on the fishing vessel while in dock] . . . Thus, at the time of Heise's injury, his connection to the [fishing vessel] was to be limited to the time that the vessel was in [dock] undergoing maintenance and repairs. . . . Because Heise was a land-based worker, he was not a seaman entitled to the remedies of the Jones Act." 79 F.3d at 906-07.

In the instant case, Gipson makes a weaker argument for entitlement to seaman status. As in *Heise*, it is clear that Gipson was merely a land-based worker.[12] His connection to barge YFN-946 was limited to the time in which the barge would be used solely as a floating, but secured, work platform for the bridge reconstruction project. Therefore, even if the Court assumed that barge YFN-946 was "in navigation" during Gipson's brief pre-accident connection to it, the facts and holding in *Heise* prescribe that the only reasonable conclusion is that Gipson was a land-based worker and, hence, was not a seaman with respect to barge YFN-946.

2. Whether Gipson Had a Connection to the Skiff That Was "Substantial in Terms of both Its Duration and Nature"

In general, Kajima argues that Gipson was essentially a land-based worker who was not exposed to the "perils of the sea," and, therefore, should not be considered a seaman. Specifically, Kajima asserts that, even if the skiff could be classified as a "vessel in navigation," Gipson's connection to the skiff was sporadic and transitory and did not give rise to seaman status. The Court agrees.

---

[12] Specifically, Gipson has never carried seaman's papers, never worked on a ship at sea, and never held a Coast Guard license. On the other hand, he does possess a crane operator's license, a Class One driver's license (to operate semi-trucks needed to move cranes from place to place), a forklift operator's license, and he is a certified welder.

As noted above, the Supreme Court has ruled that one of the requirements for seaman status is "a connection to a vessel in navigation . . . that is *substantial in terms of both its duration and nature.*" *Chandris*, 115 S.Ct. at 2190. The express purpose of this requirement is "to separate the sea-based maritime employees from those land-based workers who only have a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id.* In this case, Gipson was a member of Local 2375 of the Wilmington Pile Driver's Union, and performed primarily land-based duties prior to his brief employment on the Kajima bridge reconstruction project. Further, Gipson's only arguable connection to a "vessel in navigation" was his presence in a small skiff that ferried Gipson and other workers around the worksite. The uncontroverted facts, listed above, show that Gipson's connection to the skiff was clearly transitory and sporadic, while the vast majority of his work was performed on the bridge, on land, on the barge (a vessel *not* in navigation), or in the cofferdams.

Gipson used the skiff primarily as a means of "transitory" transportation about the worksite – a small channel in Los Angeles' inner harbor. The skiff was also used as a means for repositioning a small wooden float, as well as barge YFN-946. The evidence is not clear as to how much time Gipson spent aboard the skiff. On his fourth day of work, Gipson assisted in laying exhaust hoses across the channel. On this day, Gipson worked from a small wooden float and from the skiff. After this day, Gipson declares that he "spent 90% of each day working aboard the barge" (a vessel *not* in navigation). [Gipson Decl. ¶ 8].

"The other 10% of each of those days was spent rigging for the barge and ferrying supplies aboard the skiff." [Id.] Therefore, in summation, after Gipson spent one day divided between laying exhaust hose from a wooden float (not alleged to be a vessel in navigation) and sitting in a small metal skiff holding lines attached to the wooden float, he spent something less than 10% of his time in the small skiff, traveling about the worksite – a small channel in Los Angeles' inner harbor. This evidence is not sufficient for a reasonable jury to find that Gipson was a seaman. Gipson was a land-based worker whose duties involved a transitory and sporadic connection to a small metal skiff within a small inner harbor channel. Clearly, his duties aboard the skiff did not regularly expose him to "the perils of the sea" and his connection to the skiff was *not* substantial in terms of either its *duration* or *nature*.

In several other cases, courts have held that workers were not "seamen" despite the fact that they performed work aboard a vessel in navigation.[13] For example, in *Cabral v. Healty Tibbits Builders, Inc.*, 1995 A.M.C. 2009, 1995 WL 510326 (D. Haw. 1995), the district court held that a crane operator who worked a crane mounted upon a vessel in navigation was not a seaman because there was no indication in the record that he owed a crew

---

[13] *See Cabral v. Healy Tibbits Builders, Inc.*, 1995 A.M.C. 2009, 1995 WL 510326 (D. Haw. 195) (discussed above); *Browning v. B.F. Diamond Const. Co. Inc.*, 289 S.E.2d 268, 269 (Ga. App.), *cert. denied*, 459 U.S. 837 (1982) (worker on bridge construction project who used vessels to reach piers and footings of bridge was not a seaman because his presence on these vessels was intermittent and incidental to his construction duties).

member's "allegiance" to the vessel. 1995 WL 510326 at *4. Rather, the plaintiff's connection to the vessel was "at best transitory." *Id.* The *Cabral* ruling was based upon the Supreme Court's rulings in *Wilander* and *Chandris*, as well as Ninth Circuit authority holding that a plaintiff claiming seaman status under the Jones Act and general maritime law "must have a more or less permanent connection with the vessel." *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 569 (9th Cir. 1992), *citing*, *Estate of Wenzel v. Seaward Marine Servs., Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983); *see also Gizoni III*, 56 F.3d at 1141. In the instant case, Gipson did not have a "more or less permanent connection" with the small skiff. The vast majority of his duties were performed away from the skiff, and his connection to the skiff was merely incidental to his construction duties and was transitory at best.

The uncontroverted facts lead to only one reasonable conclusion – that Gipson was not a "seaman" and, therefore, is not entitled to relief under the Jones Act or general maritime law. Accordingly, Kajima's Motion for Summary Judgment must be GRANTED.

IV. Conclusion

For all the reasons discussed above, the Court hereby ORDERS that Kajima's Motion for Summary Judgment is GRANTED. Gipson was not a "seaman" and, consequently, has no cognizable claim under the Jones Act or general maritime law.

SO ORDERED.

DATED: July 7, 1997

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE